No. 93-1092

Supreme Court, U.S.
FILED
FEB - 4 1994

In The

Supreme Court Of The United States

October Term, 1993

E. DON SMITH and EILEEN SMITH,
Petitioners,

v.

ZONING BOARD OF APPEALS
OF THE TOWN OF GREENWICH, THE HISTORICAL
SOCIETY OF THE TOWN OF GREENWICH, INC.,
and ANITA DE LESSUPS KEEFE,
Respondents.

On Petition for Writ of Certiorari
To The Connecticut Supreme Court

BRIEF OF RESPONDENT ZONING BOARD OF APPEALS OF THE TOWN OF GREENWICH IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PERTINENT STATUTES AND REGULATIONS

Statutes

28 U.S.C. 1257(a)

§1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Rules

Supreme Court Rule 10.1(b) and (c)

Rule 10. Considerations Governing Review on Writ of Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

...

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has

decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Regulations

Greenwich Municipal Code:

Sec. 6-266(a)(19)

Sec. 6-296(d)

[Complete copies of the pertinent sections of the municipal code are set forth at pages A-1 through A-3 of the attached appendix, referred to herein as "Resp. A."]

JURISDICTION

The Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to grant a writ of certiorari to the Connecticut Supreme Court. Plaintiffs' due process and equal protection claims do not raise substantial federal questions and were not properly raised or addressed below. Plaintiffs' taking claim is not ripe for review.

STATEMENT OF CASE

The Mill Pond Historic District (the "Historic District") was created in 1975 in the Town of Greenwich (the "Town") pursuant to Connecticut's historic preservation statute. Conn. Gen. Stat. §7-147a-y (1989); plaintiffs' appendix, referred to herein as "A.", at 70. The Historic District was singled out for preservation for its considerable cultural and historic significance,

and because it "constituted a group of houses in a compatible setting which expressed modes of living of the early American and Victorian periods. No visual or other intrusions compromised the area's character." Id.

In 1984, plaintiffs purchased their property in the heart of the Historic District. A. 70. Their deed specifies that "the premises are conveyed subject to ... [r]egulations imposed by reason of the fact that the premises are part of a historic district as established by the Town of Greenwich." A. 71. The property contains a house and a barn to the rear. Id. In front of the house is a sweeping front lawn. Id. With the subsequent purchase of a small adjoining strip of property, plaintiffs owned sufficient square footage to subdivide the property into three lots. A. 76.

Plaintiffs submitted to the Town's Planning and Zoning Commission (the "Commission") a proposal to subdivide the property in early 1987. Under the proposal, two lots would contain respectively the existing house and the barn converted as a house. A third lot would be carved out of the front lawn in front of the existing house, with a new house slated for construction twenty-five feet from the street. A. 83.

The Commission granted preliminary approval for the proposed subdivision, subject to conditions. A. 96-98. Those conditions included: shifting the location of the new front lot, changing the site design to protect significant trees and meeting with the Historic District Commission "to determine an appropriate house location" for the new house that would protect the trees and conform "as

nearly as possible to the existing set-back/streetscape" of adjacent properties in the Historic District.[1] A. 96-97.

On November 22, 1988, the Commission denied the proposed subdivision after a public hearing. The Commission found that the "existing streetscape," which it defined as the "open space of the subject tract in relation to adjoining historical properties, structures, and open spaces," was a significant element of the Historic District and that the proposed subdivision would "disrupt" that "essential characteristic." A. 94-95. The Commission further found

---

[1]The conditions themselves belie plaintiffs' assertion at pages 4-5 of the petition for certiorari (referred to herein as "Pet.") that there was never any discussion of environmental, public health or safety concerns "or any objection to constructing a house on the front building lot" in the six months after conditional approval.

that there were other development options for the property that would preserve the significant components of the historic streetscape. A. 95.

At plaintiffs' request, the respondent Planning and Zoning Board of Appeals of the Town of Greenwich (the "Board") cons dered the subdivision application de novo. The Board held extensive hearings where plaintiffs were represented by counsel. The proposal was opposed by, among others, twenty-three property owners within the Historic District and representatives of the Historic District's Commission and the Town's Historical Society and Conservation Commission.

The Board upheld the Commission's denial of the subdivision application, finding that it did not conform to the subdivision regulations and the Town's

plan of development because it failed to preserve the historic streetscape. A. 90-93. As the Board found, the "integrity of the Historic District would be violated and the appearance and historic character of the Historic District would be impaired" by the plan. A. 91.

The Board rejected plaintiffs' takings argument with the findings that plaintiffs knew that the property was located in the Historic District and that their "development rights were not deprived because other alternatives for development [were] available." A. 91-92. The Board's decision makes no mention of any assertion that plaintiffs were denied due process or received discriminatory treatment.

The plaintiffs appealed the Board's decision to the Connecticut Superior Court. After trial, that court

upheld the Board's finding that the proposed construction of a house on the front lawn of the property would "drastically alter the streetscape," thereby impairing the character of the Historic District. A. 83. The court found that the Board had applied standards contained in the subdivision regulations which included specific references to consideration of historic factors. A. 82. Therefore, the Court concluded, plaintiffs "had notice that historic factors would be considered." A. 83.

The superior court's decision makes no mention of: any claimed denial of due process, an equal protection argument, a claim under 28 U.S.C. §1983, or any assertion of discriminatory treatment.

The plaintiffs appealed to the Connecticut Appellate Court. The appellate court reversed, citing four reasons:

> (1) the enabling statutes on subdivisions did not give the defendant the authority to include historical factors in its regulations; (2) the terms "town plan of development," "historic factors" and "historic street-scape" are not known and fixed standards required for subdivision regulations; (3) the Greenwich town charter forbids the board from denying a subdivision application based on the plan of development; and (4) it is the duty of the historic district commission, not the planning and zoning commission or the board of appeals, to decide whether a building should be erected in a historic district.

Smith v. Zoning Board of Appeals, 29 Conn. App. 28 (1992) (A53-67). No mention was made by the appellate court of an alleged due process violation, an equal protection argument or any claim of discriminatory treatment.

The Connecticut Supreme Court accepted certification and reversed the judgment of the appellate court. A. 1-31. The supreme court held that the Town's charter authorized the Commission to adopt subdivision regulations permitting the consideration of factors relating to historic preservation. Drawing on prior interpretations of the term "health and safety" in the context of other Connecticut land use statutes, the court concluded that this language in the charter permitted consideration of environmental concerns, including historical factors. A. 11-16. The court further concluded that under state law principles of statutory construction, the terms "historical factors" and "historic streetscape" in the subdivision regulations were reasonably precise. They were therefore suf-

ficient to guide the Commission and "certainly apprised..." plaintiffs that historic factors would be considered. Id.

The supreme court rejected petitioners' claim of a taking because the plaintiffs had failed to meet their burden of proving a final deprivation of the use of their property. A. 29-31. As for plaintiffs' claim of discriminatory treatment, the supreme court found that this claim was "only peripherally raised" before the Board and was "never corroborated...with evidence." A. 30. Because the record was insufficient, the court declined to review the claim. Id. Finally, in a footnote, the supreme court noted that its holding that the subdivision regulations were "reasonably precise...", thereby giving plaintiffs adequate notice, "disposed" of plaintiffs' argument that "they have been de-

prived of their due process rights..." A. 26.

SUMMARY OF ARGUMENT

To persuade the Court to grant certiorari, plaintiffs argue that the Connecticut Supreme Court's decision: 1) conflicts with that of the appellate court Pet. 12-14, 2) departs from the "accepted and usual course of proceedings" Pet. 14-21, and 3) is an inappropriate adjudication of what plaintiffs' strain to characterize as "federal questions." Pet. 22-28. The first two theories of plaintiffs' argument are not "special and important reasons" to review the decision of a state's highest court. Sup. Ct. R. 10.1(b)-(c). As to the third contention, plaintiffs have failed to raise any reviewable or substantial federal question. Plaintiffs'

claims of denial of due process and discriminatory treatment were neither properly raised nor addressed below and do not present substantial federal questions. Their takings claim is premature and must be dismissed for want of jurisdiction. Therefore, the Court lacks jurisdiction pursuant to 28 U.S.C. §1257 to grant a writ of certiorari to the Connecticut Supreme Court and the petition must be denied.

ARGUMENT

I.

THE "DUE PROCESS" CLAIM RAISES NO REVIEWABLE FEDERAL QUESTION

Plaintiffs' "due process" argument appears to be that the term "health and safety" in the Town's charter is an overly vague standard for the consideration of historic factors.

(Pet. i)[2] This contention was not properly presented to or addressed by the state courts and fails to raise a substantial federal question.

1. The Issue Was Neither Raised Nor Addressed In the State Courts

In reviewing the judgments of state courts under 28 U.S.C. §1257, the Court has consistently refused to decide issues that were neither raised nor addressed below. Yee v. City of Escondido, 112 S.Ct. 1522, 1531 (1992); Illinois v. Gates, 462 U.S. 213, 217-224 (1983).

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[2]Plaintiffs misstate the record and the law in attempting to frame the issue. Their proposed subdivision did not "meet[] all written regulations" Pet. i; the proposal met zoning requirements but failed to comply with the subdivision regulations. Similarly, the proposed subdivision was not denied, as plaintiffs repeatedly assert, on the grounds that it was offensive to a vague notion of "public health and safety". The proposal was denied pursuant to regulations specifically calling for the consideration of historic factors and for the redesign of subdivision

Plaintiffs never made in the state courts the "due process" argument they now seek to assert. Neither the trial court nor the appellate court considered any alleged due process claim, presumably for want of proper presentation. Webb v. Webb, 451 U.S. 493, 495 (1981).

In the supreme court, plaintiffs for the first time complained that the subdivision regulations offended "due process"[3] under the theory that terms relating to historic considerations were vague. The supreme court responded in a footnote that plaintiffs' "due process" claim was "disposed of" by the supreme

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[2](cont'd) plans to protect historic resources. Finally, the proposal was not denied "just because it is located within a residential Historic District" Pet. i, but rather because it would have a drastic impact on the Historic District.

[3]Exactly what "due process" requirement is offended was unclear. The only specific reference in the portion of

court's holding that the regulations were sufficiently precise and gave plaintiffs adequate notice. A. 26.

In light of the adverse holding by the supreme court, plaintiffs now attempt to conjure up a different "due process" claim that the state courts were never asked to consider. Under these circumstances, whether for lack of jurisdiction or because of prudential concerns, the plaintiffs' request that the Court hear the due process issue should be denied. Yee, 112 S. Ct. at 1531.

2. No Substantial Federal Question is Raised

More fundamentally, the Court should decline certiorari for lack of a

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[3](cont'd) plaintiffs' brief to the Supreme Court devoted to "due process" is an allusion to Section 8-2 of the Connecticut General Statutes, which plaintiffs describe as imposing a "due process" requirement for special permits. Resp. A. 4-9.

substantial federal question.

A substantial federal question conferring jurisdiction on the Court is a real, substantive question on which a case may be made to turn. City of New Orleans v. New Orleans Waterworks Co., 142 U.S. 79, 87 (1902); Millinger v. Hartuper, 6 Wall 258 (1867) (something more than a "bare assertion" of a federal question is required).

Plaintiffs' invocation of constitutional "labels" and recitation of general holdings utterly fail to invoke a constitutional question of substance. The supreme court's construction of the Town's Charter is a matter of state law which does not involve -- and cannot be made to involve -- any issue arising out of the due process clause of the federal Constitution.

The charter is the enabling act which grants the Town authority to enact and enforce subdivision regulations. West Hartford Taxpayers Assn., Inc. v. Streeter, 190 Conn. 736, 742, 462 A.2d 379 (1983). Its provisions are interpreted according to general rules of statutory construction. Arminio v. Butler, 183 Conn. 211, 217, 440 A.2d 757 (1981).

The interpretation of state statutes is uniquely a matter of state law and the decisions of state courts are generally binding on the Court. Terminillo v. Chicago, 337 U.S. 1, 4 (1948) (construction of ordinance is a ruling on a state law question that "is as binding...as though the precise words had been written into the ordinance"). Indeed, "it takes more than a possible misconstruction" of a statute by a

state's highest court to make a due process claim under the Fourteenth Amendment. Seattle, Renton & Southern Railway Co. v. State of Washington, 231 U.S. 568, 570 (1913).

Applying state law, the supreme court interpreted the term "health and safety" in the charter provision relating to subdivisions to authorize the consideration of environmental factors, including historical factors. Also applying Connecticut law, the supreme court concluded that the terms "historical factors" and "historical streetscapes" used in the regulations and the Town plan of development had a reasonably precise meaning and apprised plaintiffs that historic factors would be considered. This construction of the

Town's charter and regulations is amply supported by the supreme court's prior interpretations of Connecticut statutes, and does not give rise to any federal question.[5] The supreme court's construction of state law is also binding on this Court.

II.

THE COURT SHOULD DECLINE TO REVIEW PLAINTIFFS' EQUAL PROTECTION CLAIM

The plaintiffs also assert under the rubric of an "equal protection" claim or a claimed deprivation of their civil rights that the subdivision regula-

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[5] Even if a federal question were raised, no special or important reasons exist for granting a writ of certiorari. Plaintiffs do not cite any decision by the Court, a federal court of appeals or the highest court of any state that is contrary to the precise issue considered by the supreme court. Respondent is unaware of any such authority. The only other highest state court to consider a comparable issue reached the same result. Victorian Realty Group

tions were unequally applied to them and throughout the Historic District. Pet. i Like the "due process" claim, this argument is wholly insubstantial, consisting of nothing more than a recitation of constitutional and statutory provisions and general holdings. Moreover, it is wholly lacking in record foundation.

The "discrimination" claim was not mentioned before the Board and the record is virtually devoid of any evidence submitted to the Board sufficient to examine such a claim. Neither the trial court nor the appellate court addressed the issue.

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[5](cont'd) v. City of Nashua, 130 N.H. 60, 534 A.2d 381 (1987) (subdivision regulation requiring consideration of "health and welfare" authorized planning board to consider historic factors)

In light of this history, the supreme court stated that the claim of discriminatory treatment was "only peripherally raised" before the Board and "never corroborated ... with evidence." A. 30. The supreme court declined to review the claim for wont of a sufficient record. Id. For the same reason, and because no substantial federal question is raised, the Court should also decline to review the issue. Yee, 112 S. Ct. at 1531.

III.

PLAINTIFFS' "TAKINGS" CLAIM IS NOT RIPE; IN ANY EVENT, NO TAKING HAS OCCURRED

The Connecticut Supreme Court found no merit to plaintiffs' takings claim because the plaintiffs had not met their burden under Connecticut law of proving that they had been finally deprived of the reasonable and proper

use of their property. A. 29-31. See Gil v. Inland Wetlands and Watercourses Agency, 219 Conn. 404, 415, 593 A.2d 1368 (1991); Luf v. Southbury, 188 Conn. 336, 351-52, 449 A.2d 1001 (1982). The supreme court's conclusion is fully consistent with the Court's decisions requiring a final decision regarding property development before a takings claim is ripe for review. MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986); Williamson Planning Commission v. Hamilton Bank, 473 U.S. 172, 186-194 (1985); Penn Central Transp. Co. v. New York City, 438 U.S. 104, 136-137 (1978).

Plaintiffs have been denied a particular subdivision application. As the Connecticut Supreme Court recognized, this denial "does not lead to the conclusion that other plans will be denied as

well..." A. 30. Plaintiffs remain free to reconfigure their proposal to reduce its adverse impact on the Historic District, and were repeatedly encouraged to do so.

Indeed, the Board specifically found that plaintiffs have other viable alternatives to develop their property. A. 92. This factual finding was not disturbed by any of the reviewing courts.[6] Under these circumstances, the Board's denial of approval "does not conclusively determine whether [plaintiffs] will be denied all reasonable

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[6]Plaintiffs' only challenge to this finding is an allusion to testimony of the Board's chairman, who suggested that an alternative option did not merit discussion because of his speculation that the Historic District's Commission would not approve it. As pointed out by the Connecticut Supreme Court, this testimony "does not establish that the Board believe[d] that there are no viable alternatives." A. 30.

beneficial use of their property and therefore is not a final reviewable decision." Williamson, 473 U.S. at 194.

In fact, plaintiffs' true complaint is not that their property has been confiscated, but rather that the alternatives for subdivision are not to their liking.[7] This, however, is not tantamount to a deprivation of "all economically beneficial use" of their property. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1991); Gil v. Inland Wetland & Watercourses Agency, 219 Conn. 404, 415, 593 A.2d 1363 (1991).

Plaintiffs' assertion that they have been deprived of the entire value

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[7]As they point out, "[f]irst and foremost, why should [they] be forced to consider alternatives (which are unacceptable to them as well as to their neighbors)...?" (Pet. 25)

of a "free-throw lot" is disingenuous. Assuming for the purposes of argument that they are entitled to take a "free-throw" lot in the manner they describe, the denial of their subdivision proposal has no impact on their ability to do so subject to whatever regulatory limitations are imposed because the property lies within the Historic District.[8] They simply have not been denied all economically beneficial use of all or any portion of their property. Therefore, no taking has occurred.

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[8] Plaintiffs represent that their property has not been divided since 1911 and that they may take a free-throw lot by presenting their deed to the Town. These "facts" are not in the record.

CONCLUSION

For the foregoing reasons, as well as those set forth in the brief of the other respondents in opposition to the petition for certiorari, the respondent Zoning Board of Appeals of the Town of Greenwich[9] respectfully requests that the petition for certiorari be denied.

ZONING BOARD OF APPEALS OF
THE TOWN OF GREENWICH

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[9] As previously stated, the full title of the Board is the Planning and Zoning Board of Appeals of the Town of Greenwich. However, since both the caption of the decision of Connecticut Supreme Court and the petition refer to the Zoning Board of Appeals of the Town of Greenwich, the Board has adopted that reference throughout this brief to avoid confusion.

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APPENDIX

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APPENDIX

Sec. 6-266. Preliminary layout contents

...

(19) For a subdivision of ten (10) lots or more or the subdivision of ten (10) or more acres, an environmental assessment by qualified environment specialists shall be provided. The Commission may require said assessment for smaller subdivisions if deemed necessary. The assessment shall include an evaluation of the following: (3/9/81)

(a) Conformance with the Open Space Plan of Development

(b) Significant wetlands

(c) Steep Slopes

(d) Stormwater Drainage

(e) Soils capabilities

(f) Vegetation including forested areas and the identification

of trees over 10" in caliper when not part of forested areas

(g) Significant geological formations

(h) Historical and archaelogical [sic] factors

(i) Animal habitats

(j) Water availability and quality

(k) Aquifer protection in accordance with the Statutes of the State of Connecticut

(l) Other data which the Commission deems appropriate

The environmental assessment shall be subject to a review, after the receipt of recommendations of the Conservation Commission, by the Planning and Zoning Commission including the mitigation measures for minimizing environmental impact before the applicant proceeds to final plan.

...

Sec. 6-296. Natural features; preservation.

(d) Where an Environmental Assessment indicates the need for a redesign or larger lots in order to protect environmental or historic resources, the Commission may require such revisions. (3/9/81)

[Pages 9 - 11 of Plaintiffs' Brief
to the Connecticut Supreme Court]

DUE PROCESS:
THERE IS NO "NOTICE" IN TOWN DOCUMENTS

There is no way that the Appellees could have been forewarned that they would be unable to subdivide and build within an Historic District. Prohibition of subdivision and consequent house construction, according to code, is not prohibited in any of the State or town documents, including Appellee's deed.

The C.G.S. $ 8-2 has a due process requirement, stating that (special permits) must be issued in accordance with standards set forth in the regulations.

"The terms "town plan of development", "historic factors", and "historic streetscape" are not known and fixed standards required for subdivision regulations." (28 App.29)

"The test of a permissible sub-

division regulation is whether criterior [sic] contained in the regulation are as reasonably precise as subject matter requires and are reasonably adequate and sufficient to guide city planning commission and to enable those affected to know their rights and obligations." American Power & Light Co. v Securities & Exchange Comm. 329 U.S. 90, 105, 67 S. Ct. 133, 91 L.Ed 103 Ours Properties, Inc. v. Ley, 198 Va. 848, 851, 96 S.E. 2d. 754; 1 Am. Jur. 2d, Administrative Law, $118.

It is well established that subdivision regulations, in order to be legally valid, must: 1) set forth "known and fixed standards;" and, 2) conform to the principle "that a regulation ... cannot be too general in its terms." Sonn v Planning Comm. of Bristol, 172 Conn 156. Aunt Hack Ridge Estates, Inc. v

Planning Comm. 160 Conn. 109.

"A 'general objective' ... could not serve as the basis for denying the plaintiff's site plan application but could only have served as a reason for requiring modification." T.L.C. Development v. P&Z Comm. Town of Branford 215 Conn. 527 (1990).

The Supreme Court sustained the Trial Court's conclusion that this reason (poor use of site) was "vague, uncertain in meaning and provided no real quidance [sic] to the plaintiff as to the manner in which the plan failed to comply with the requirements of the regulations." Kosinsky v. E. Lawlor, 177 Conn. 420.

"Zoning regulations merely stating broad legislative purpose did not provide any standard for approval or denial of site plans and could be used by

members of planning section of P & Z Commission only in conjunction with, and not as an alternative to, standards as contained in applicable zoning regs; thus, members of planning section exceeded their authority in denying approval of a site plan on ground that plan presented a poor use of the site." Kosinski v Lawlor 177 Conn 420.

The broad concepts "town plan, historic factors, and historic streetscape: do not meet the above quoted test for the validity of a regulation because they are too vague.

THEREFORE, THE ZBA ACTED ILLEGALLY, ARBITRARILY AND IN ABUSE OF ITS DISCRETION WHEN IT DENIED THE SUBDIVISION.

Tondro, in his 1992 Connecticut Land Use states on page 113: "Most of the cases that have rejected municipal efforts to regulate for aesthetic

reasons have done so because the town did not articulate sufficient criteria in its regulations to satisfy the court that fair notice of what was required had been provided."

"Even though zoning regulations could impose aesthetic controls, they had to use words less vague than 'unsightly' to do so." Town of Newtown v. Plunske, Conn L. Tribune 9/30/85 page 10.

Tondro, describes a comparable case to Appellees' (Tondra, supra p. 190) "This case involved the power to certify compliance with a regional water plan, the Supreme Court holding that the defendant could neither decide nor refuse to decide until it had prepared a plan --- the functional equivalent of the standards in a regulation governing the

granting of a special permit, subdivision approval, or site plan approval."

The case referred to is Monroe v. Middlebury Conservation Comm'n, 187 Conn. 476, 484, 447 A.2d 1, 5 (1982) (citations omitted):

> To hold otherwise, to permit an administrative agency to develop an ad hoc plan as a yardstick against which to measure any given proposal, is to substitute whimsy for sound judgment.... Giving an administrative agency such absolute power could deprive a land-owner of his property, without due process of law.... Although due process is not intended to hold administrative agencies under a short leash, it is designed to restrain them from roaming at will over the adjudicative landscape.

Clearly a planning and zoning commission cannot take into account the fact that the property is located in an Historic District if they have not written specific regulations to guide themselves and those citizens affected.

TO DO SO WOULD BE TO EXCEED THEIR AUTHORITY